Testimony of the Civil Justice Clinic, Quinnipiac University School of Law

Regarding SB 1085

Judiciary Committee

March 22, 2019

Dear Members of the Judiciary Committee:

We submit this testimony regarding SB 1085, An Act Concerning the Legalization of the Retail Sale and Possession of Cannabis and Concerning Erasure of Criminal Records in the Case of Convictions Based on the Possession of a Small Amount of Cannabis. Although this bill represents an important step forward, we urge the Committee to amend the bill to (1) place the burden on the state to identify and erase past marijuana possession convictions rather than requiring individuals to petition the court in each case; (2) address cases where individuals are facing marijuana charges or serving a sentence for such an offense to ensure these cases are promptly brought to court; (3) redesignate sale of marijuana as a misdemeanor rather than a felony and redesignate past sale convictions as misdemeanors; and (4) extend legalization to community supervision (i.e., probation, parole, and pretrial release) to prevent unnecessary violations and incarceration based on marijuana use that is lawful for the general public.

I. ERASURE OF MARIJUANA POSSESSION CONVICTIONS

If Connecticut legalizes marijuana possession, the burden should be on the state to identify and erase marijuana possession convictions rather than on individuals to petition the court for relief as SB 1085 proposes. Ultimately, placing the burden on the state will save time and resources for courts and will ensure that those eligible for relief do not face barriers in accessing jobs, licenses, and housing because of past convictions. Given that the state possesses and disseminates information relating to criminal convictions, the state should undertake the effort of erasure when the conduct underlying the conviction is no longer criminal.

A. Current Law in Connecticut

Under current Connecticut law, an individual with a conviction for an offense that is later decriminalized can petition the court for an order of erasure.[1] However, the burden is on the individual to file the petition in court and establish an adequate factual record showing that the conduct of conviction has been decriminalized.[2] Connecticut law currently provides for the automatic erasure of police and court records when a charge has been dismissed or nolled, or a defendant has been acquitted after trial.[3]

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[1] Conn. Gen. Stat. § 54-142d. Such an order directs "all police and court records and records of the state's or prosecuting attorney pertaining to such case to be physically destroyed." *Id.*

[2] Currently, individuals convicted of marijuana possession can obtain an erasure order if they establish that the offense involved possession of less than a half-ounce of marijuana (as this conduct was decriminalized in 2011). Because the statute of conviction covered possession of larger amounts of marijuana as well, petitioners must establish the quantity of marijuana involved in the offense. *State v. Speilberg*, 323 Conn. 756 (2016).

[3] Conn. Gen. Stat. § 54-142a.

B. Approaches of Other States

Under legislation passed in California in 2018 following legalization, the state Department of Justice has until July 1, 2019 to identify cases that may be eligible for sealing or redesignation because the conduct underlying the offense is no longer criminal or the offense was reduced to a misdemeanor or infraction.[4] After the convictions have been identified, prosecutors then have one year, from July 1, 2019 to July 1, 2020, to decide whether to challenge the sealing or redesignation of identified cases. Any case that prosecutors do not challenge will be sealed or redesignated. The public defender's office must make reasonable efforts to notify the person whose entitlement to relief is being challenged. Those who are presently serving a sentence or who proactively petition for dismissal will be prioritized for review and dismissal. Any felony conviction redesignated as a misdemeanor or infraction "shall be considered a misdemeanor or infraction for all purposes."

San Francisco's District Attorney is moving the process along even faster than legislation requires and announced in February 2019 that, using an "advanced open-source computer algorithm," the office identified over 9,300 eligible cases that will soon be presented to judges for sealing or redesignation.[5] The District Attorney's office worked with the advocacy group Code for America to identify both misdemeanor and felony marijuana convictions dating back to 1975. The work with Code for America happened faster than expected and was under the allotted budget. Prosecutors in other cities such as Boulder and Seattle are taking the lead in affirmatively identifying convictions and petitioning for their erasure.[6] A bill placing the burden on prosecutors to identify past marijuana convictions and move for their expungement is pending in Oregon, and automatic expungement legislation has been in introduced in Massachusetts and in Congress.[7]

C. Proposal for Connecticut

SB1085 establishes a process for individuals to petition the court for erasure of prior convictions for possession of marijuana in an amount equal to or less than one and one-half ounces. Under a petition-based system, however, individuals who should benefit the most from legalization are least likely to see those benefits. Those with resources are more likely to be able to navigate the petition process even though they have likely faced fewer barriers based on the convictions. The petition process is also inefficient for the courts and prosecutor offices. Rather

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[4] Cal. Health & Safety Code § 11361.8, 11361.9.

[5] Owen Daugherty, *San Francisco to expunge over 9,300 marijuana-related convictions*, THE HILL, Feb. 25, 2019, https://thehill.com/homenews/state-watch/431466-san-francisco-to-expunge-over-9300-marijuana-related-crimes.

[6] *See, e.g.* Mitchell Byars, *Boulder County DA Looking to Dismiss Thousands of Past Marijuana Possession Convictions*, Daily Camera, Nov. 30, 2018, http://www.dailycamera.com/news/boulder/ci_32302890/boulder-county-da-looking-dismiss-thousands-past-marijuana; Christina Maxouris and Brandon Griggs, *Seattle Will Vacate more than 500 Convictions for Marijuana Possession, Saying They Unfairly Impact People of Color*, CNN, Sept. 25, 2018, https://www.cnn.com/2018/09/25/health/seattle-vacates-weed-charges-trnd/index.html.

[7] SB 420 (Ore. 2019), https://legiscan.com/OR/bill/SB420/2019, H.B. 2785 (Mass. 2017), https://trackbill.com/bill/massachusetts-house-bill-2785-an-act-relative-to-the-expungement-of-records-of-marijuana-arrests/1435526/#/details=true; S 579, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/597?q=%7B%22search%22%3A%5B%22marijuana+justice+act%22%5D%7D&s=1&r=2.

than requiring people to petition individually, we suggest that the bill be amended to establish the following process:

- **Possession Offenses Committed on or after October 1, 2015: Automatic Erasure Absent Prosecutor Objection**

  Following legislation that took effect on October 1, 2015, possession of all types of drugs is charged as a misdemeanor under Conn. Gen. Stat. § 21a-279(a) (simple possession) and § 21a-279(b) (possession in a school zone or other restricted area). To address erasure of these more recent offenses, we recommend that legislation require identification by the Judicial Branch of all convictions for violations of § 21a-279(a) and § 21a-279(b). The office of the state's attorney should be given a period of time to review the cases and either agree to erasure or object on the ground that the offense did not involve marijuana or that the quantity of marijuana possessed was greater than one and one-half ounces. Cases with no objection filed would be erased automatically by state agencies. Cases where an objection is filed would be considered by the court with the burden on the on the prosecutor to establish that the conviction involved a substance other than marijuana or a quantity in excess of one and one-half ounces.

- **Possession Offenses Committed prior to October 1, 2015: Automatic Erasure**

  For offenses committed prior to October 1, 2015, marijuana possession was charged as a misdemeanor under Conn. Gen. Stat. § 21a-279(c) if less than four ounces of marijuana was involved in the offense. Although some other substances could technically be charged under that subsection, the vast majority of offenses charged under § 21a-279(c) involved marijuana (and none of the offenses involved narcotics or hallucinogens, which were charged under other subsections). Unfortunately, charging documents do not typically identify the particular substance and quantity of drug involved in the offense and the Judicial Branch's database does not contain this information. Rather than engage in the time-intensive process of considering individual petitions to determine substance type and quantity, we suggest that state agencies (Judicial and the state police) simply identify and erase all convictions under § 21a-279(c)—as the agencies can identify convictions under a particular subsection without difficulty.[8]

  Note: as an alternative to erasing all of the convictions under § 21a-279(c), the legislation could establish the same process with respect to these older possession convictions as with the more recent convictions (i.e., permitting prosecutor objection before the convictions are erased). However, given that the offenses under § 21a-279(c) are all at least three years old and the vast majority involved marijuana, we recommend simply erasing these convictions.

[8] If these convictions involved an increased penalty based on possession in a school zone (or other restricted area), those school-zone convictions should be erased as well. Prior to 2015 legislation, individuals convicted of possessing marijuana in a school zone had a mandatory two-year sentence imposed consecutive to their sentence for the underlying marijuana possession offense. *See* Conn. Gen. Stat. § 21a-279(d) (2014).

II. PENDING CHARGES OR CASES WHERE THE SENTENCE IS NOT COMPLETE

The legislation should also address individuals who are facing charges for possession of marijuana or marijuana-related paraphernalia, or serving a sentence based in whole or in part on such offenses. The Judicial Branch should be required to identify all pending charges and convictions for drug possession (§ 21a-279(a), (b)) and possession of drug paraphernalia (§ 21a-267). The office of the state's attorney should then be required to determine which charges and convictions are marijuana-related. Those cases should be brought to court on an expedited basis. In cases involving pending charges, the marijuana-related charge should be dismissed. In cases where someone is serving a sentence imprisonment or is on probation or parole for a marijuana-related conviction, the sentence should be terminated and the conviction vacated and erased. If someone is serving a sentence as a result of a probation violation where the underlying conviction is under sections 21a-279(a), 21a-279(c), and 21a-267, the person's sentence should be terminated and the underlying conviction vacated. The legislation should also provide that individuals facing charges or serving a sentence for such marijuana-related offenses may petition directly to court for relief and these cases will be heard on an expedited basis (in other words, individuals need not wait for the cases to be identified by the office of the state's attorney).

III. REDESIGNATING MARIJUANA SALE AS A MISDEMEANOR

SB 1085 keeps in place the current penalties for unauthorized sale of marijuana, which is up to seven years' imprisonment for a first offense and up to fifteen years for a second offense. *See* Conn. Gen. Stat. § 21a-277(b). We recommend the following:

- **Unauthorized sale of marijuana should be reclassified as a Class A misdemeanor.** Notably, unauthorized sale of marijuana in California is now a misdemeanor offense.[9] In Massachusetts, unauthorized sale of less than 50 pounds is punished by no more than 2 years for a first offense and 2.5 years for a second offense.[10]

- **The legislation should establish a process for redesignating marijuana sale convictions as misdemeanors and provide that any redesignated conviction shall be considered a misdemeanor for all purposes.** As with marijuana possession convictions, the burden should be on the state to identify marijuana sale convictions so they can be redesignated. In particular, the Judicial Branch should be required to identify all violations of § 21a-277(b) and the office of the state's attorney should have a period of time to file an objection on the ground that the case did not involve marijuana. All cases where an objection is not filed should be redesignated by state agencies. Cases where an objection is filed should be considered by the court with the burden on the prosecutor to establish that the case involved a substance other than marijuana. **The legislation should also provide a similar redesignation process for prior drug possession offenses that were felonies before legislation enacted in 2015 made all drug possession offenses misdemeanors under § 21a-279(a).**

[9] California Health & Safety Code §§ 11359, 11360, 11361.
[10] Mass. Gen. Laws, ch. 94C, § 32C

IV. USE OF MARIJUANA WHILE ON COMMUNITY SUPERVISION

Legislation should also address the use of marijuana while on probation, parole, or pretrial release. Across the state, people on community supervision are subject to regular testing for marijuana use. A positive test for marijuana can violate a person's bail conditions and lead to pretrial detention. Similarly, probation and parole officers can cite a positive test in a revocation petition, which can lead to reincarceration.

Other states are addressing this issue. For example, Washington stopped routinely testing parolees for marijuana use after legalization.[11] In October 2018, five former Commissioners of New York City Probation testified before the New York State Assembly, stating: "Under a legal regime in which marijuana consumption will no longer be a criminal act, we would urge you to codify protections for those under community supervision, to prevent needless violations and incarceration based on actions that would be legal for a member of the general public in our state."[12] If marijuana is legalized, then "prohibition of marijuana use should not be imposed as a condition for those under probation or parole supervision except in rare and specific circumstances" and people under supervision should not be tested for marijuana on a routine basis. Citing studies, the former commissioners noted there is "no compelling evidence that marijuana use threatens public safety" and research instead indicates that "drug testing as a component of community supervision increases the likelihood of incarceration for violations, but does not reduce criminal behavior." The former commissioners stressed the importance of upfront codification to prevent uneven (and unequal) responses to marijuana legalization within and across probation and parole departments.

In Connecticut, the community supervision population is more than twice the size of the custodial population, with 1 in 63 adults under either probation or parole supervision.[13] Despite efforts at reform, violations of probation and parole are still significant drivers of our incarceration rates.[14] Marijuana use by those on probation and parole should be prohibited only when specific circumstances, found by the court or the Board of Pardons and Paroles, warrant the restriction. If concerns about addiction are present, the issue should be treated as a public health rather than criminal justice issue.

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[11] See https://www.oregonlive.com/marijuana/index.ssf/2014/05/marijuana_news_parolees_in_was.html

[12] Testimony of Vincent N. Schiraldi, on behalf of five former Commissioners of New York City Probation (October 2018), https://thecrimereport.org/wp-content/uploads/2018/10/SCHJIRALDI-Marijuana-testimony-final-10.15.18.pdf

[13] Pew Charitable Trusts, *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, 1 (Sept. 2018), https://www.pewtrusts.org/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities.

[14] Office of Policy & Mgmt., *Monthly Indicators Report* (Janaury 2019), https://portal.ct.gov/-/media/OPM/CJPPD/CjResearch/MonthlyIndicators/2019-Monthly-Indicators-Reports/MonthlyIndicatorsReport-JAN-2019-FINAL.pdf?la=en; *See, e.g.*, Josh Kovner, *Malloy Seeks to Stem Tide of Parolees Returning to Prison on Rule Violations*, Hartford Courant, 4/3/2016; https://www.ct.gov/opm/lib/opm/cjppd/cjcjpac/20151030_cjpac_specialparole_presentation.pdf.